

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-023



FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application, including his military records, on October 28, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 18, 2017, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former Coast Guard recruit, asked the Board to correct his discharge form DD 214 to show that the disability for which he was discharged on March 31, 1970, was not a condition that pre-existed his enlistment on October 20, 1969. The applicant alleged that he discovered this error in May 2015. To support his request, the applicant submitted copies of some of his medical records, which are included in the summary below.

SUMMARY OF THE RECORD

On October 20, 1969, the applicant enlisted in the Coast Guard and began recruit training. Although no problem with his ears had been discovered during his pre-enlistment physical examination, beginning on October 30, 1969, the applicant repeatedly sought treatment for "stuffy ears" and ear aches. He was diagnosed with an upper respiratory infection and otitis media—inflammation of the middle ear. The applicant was prescribed antibiotics and prohibited from swimming.

Because he continued to report having "stuffy ears," the applicant was sent to a hospital for testing and examination. On December 3, 1969, a doctor noted that an audiogram had shown that the applicant's hearing was normal, but a physical examination showed that both of the applicant's tympanic membranes were "retracted." On January 6, 1970, another doctor reported

that the applicant's tympanic membranes were "scarred and retracted." The record shows that the applicant could not pass a swimming test to complete recruit training because he was not allowed to swim.

On January 14, 1970, the applicant was referred to a specialist, who diagnosed the applicant with "tubotympanitis" (inflammation of the auditory tube) because of "Eustachian tube dysfunction." The specialist stated that the applicant's ears showed "bilateral retraction especially on the left of the pocket on the left also extending into the attic." He stated that the applicant should be excused from swimming and diving.

On January 28, 1970, a Medical Board reported that the applicant was unfit for duty because of "Eustachian tube dysfunction with tubotympanitis" and should be referred to a Physical Evaluation Board (PEB). The Medical Board stated that the applicant "does not meet with the standards for service" in the Medical Manual and should be separated because of the physical disability in accordance with Article 12-B-9 of the Personnel Manual.¹ The Medical Board stated that the condition had been incurred in the line of duty and did not exist prior to entry. The applicant signed a form to acknowledge this finding and recommendation but did not indicate whether he desired to rebut them.

A PEB convened on February 16, 1970, and on a report dated March 23, 1970, found that the applicant's Eustachian tube dysfunction was not incurred on active duty and was not a result of active duty. The "aggravation" of the condition was found to have been incurred on active duty but was assigned a zero-percent disability rating. The "Explanatory Note" on the PEB report states, "While the evaluatee had a temporary aggravation of his condition during service due to an upper respiratory infection, the aggravation has now subsided. The underlying condition existed prior to service and is not ratable. Discharge under Article 12-B-9 of the Personnel Manual is recommended."

The applicant was assigned counsel regarding his rights with respect to the PEB report and his separation processing. On March 3, 1970, the applicant signed a block on the PEB report stating, "I accept the tentative findings and waive my rights to a formal hearing before the Physical Evaluation Board."

On March 24, 1970, the Physical Review Council reported that that the "[e]valuee has accepted the findings" of the PEB and so the case should be forwarded for legal review. On March 25, 1970, an attorney found that the proceedings were correct and that the preponderance of the evidence supported the findings. The Chief of the Office of Personnel approved the PEB's findings and recommendation the same day and directed that the applicant be separated "without severance pay, by reason of physical disability existing prior to enlistment."

On March 27, 1970, the Commandant issued orders to discharge the applicant "without severance pay by reason of physical disability existing prior [to enlistment]" in accordance with Article 12-B-9 of the Personnel Manual.

¹ Article 12-B-9 of the Personnel Manual in effect in 1970, CG-207, authorized the discharge of members due to disability, including both pre-existing disabilities and those incurred on active duty.

On March 31, 1970, the applicant signed a Page 7 entry, acknowledging that he was being honorably discharged under Article 12-B-9 of the Personnel Manual “by reason of physical disability existing prior to entry on active duty as established by Physical Evaluation Board convened on 16 Feb 1970 and approved by Commandant 25 Mar 70.” His DD 214, which he signed, shows that he was honorably discharged under Article 12-B-9 because of a “physical disability existing prior to entry on active duty – established by Physical Evaluation Board proceedings – not entitled to receive severance pay.” The applicant had served on active duty for five months and eleven days.

VIEWS OF THE COAST GUARD

On March 23, 2017, the office of the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request and adopting the findings and analysis provided in a memorandum on the case provided by Commander, Coast Guard Personnel Service Center (PSC).

PSC stated that the application is not timely and the applicant has not justified his delay. Therefore, PSC argued, the case should not be considered by the Board beyond a cursory review.

PSC summarized the applicant’s medical records and concluded that the applicant’s DD 214 is correct. PSC argued that the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that the PEB’s determination that his Eustachian tube dysfunction existed prior to his enlistment was erroneous even though it was not noticed during his pre-enlistment physical examination.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 24, 2017, the Board received the applicant’s response to the views of the Coast Guard. The applicant argued that the records show that his ear condition did not exist prior to entry and was incurred in the line of duty. He also claimed that he lost hearing while on active duty and never recovered it. He stated that he has suffered this disability since his discharge and it has never cleared up. He stated that he did not seek correction of his record sooner because he did not want to ask for help.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submissions, and applicable law:

1. The Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b), an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his military record. The applicant received DD 214 showing that he was discharged due to a pre-existing physical disability in 1970. Therefore, his application is untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”²

4. Regarding the delay of his application, the applicant stated that he did not seek correction of his record sooner because he did not want to ask for help. The Board finds that the applicant’s explanation for his delay is not compelling because he has not shown that anything prevented him from seeking the correction within three years of his discharge.

5. A cursory review of the merits of this case shows that the applicant’s claim lacks potential merit. His medical records show that he began complaining of ear problems just ten days after he enlisted. He was diagnosed with “Eustachian tube dysfunction with tubotympanitis” and prescribed antibiotics, but an audiogram showed that his hearing was normal. On January 28, 1970, a Medical Board reported that he was unfit for duty because of his Eustachian tube dysfunction with tubotympanitis (inflammation) and should be referred to a PEB. The Medical Board reported that the diagnosis did not exist prior to his enlistment and was incurred on active duty, but the Medical Board did not specify whether this assessment applied to both the Eustachian tube dysfunction and the tubotympanitis (inflammation) or just one of them. The Medical Board also recommended that the applicant be discharged under Article 12-B-9 of the Personnel Manual then in effect, which authorized the discharge of members who did not meet the physical standards for military service because of a disability. The medical records further show that the PEB found that the applicant’s Eustachian tube dysfunction had pre-existed his enlistment and had not been incurred on active duty and that the inflammation in his ears (tubotympanitis) was a temporary condition that had subsided. The PEB recommended that the applicant be discharged because of his pre-existing disability under Article 12-B-9. The record also shows that after consulting an attorney, the applicant voluntarily accepted the PEB’s findings and recommendation and waived his right to a formal hearing. Therefore, the Board’s cursory review shows that the applicant received due process and was discharged because of a pre-existing dysfunction of his ears. By law, these medical records are presumptively correct,³ and the applicant has submitted insufficient evidence to overcome this presumption.

6. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations. The applicant’s request should be denied.

² *Allen v. Card*, 799 F. Supp. 158, 164-65 (D.D.C. 1992); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

³ 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith.”).

ORDER

The application of former [REDACTED] USCG, for correction of his military record is denied.

August 18, 2017

